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MISCELLANEOUS:

Proceedings of the Constitutional Convention of Hawaii 12, 13, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

JOHN A. BURNS, Governor of the State of Hawaii,
Appellant,

v.

WILLIAM S. RICHARDSON, ET AL., *Appellees.*

Appeal from the United States District Court for the District of Hawaii

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JURISDICTIONAL STATEMENT

Appellant, John A. Burns, Governor of the State of Hawaii, appeals from the order of the United States District Court for the District of Hawaii dated February 17, 1965, and entered on April 9, 1965, and the order of that court entered on April 28, 1965, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court dated February 17, 1965, is reported at 238 F. Supp. 468. Its opinion dated April 28, 1965, is reported at 240 F. Supp. 724. The opinions and orders are set forth as Appendices

A and C, respectively, pp. 1a to 20a and 24a to 38a, respectively, *infra.*

JURISDICTION

This suit was brought under the Civil Rights Act, 42 U.S.C. §§ 1983, 1988, and under 28 U.S.C. § 1343, for a declaration of the invalidity, and to enjoin the enforcement, operation and execution, of the provisions of the Constitution of the State of Hawaii establishing the apportionment of seats in the Hawaii Legislature, on the ground of their repugnancy to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. (R. 2-33)*

The first of the orders of the District Court from which this appeal is taken, was dated February 17, 1965, but was not entered with the Clerk until April 9, 1965 (Appendix A); the second was dated and entered on April 28, 1965 (Appendix C). The second order of the District Court reinstated certain provisions of the first order which had been, in the interim, provisionally amended and stayed.[1]

Notice of appeal was filed in the District Court on May 3, 1965. (R. 612)

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* References to the record certified by the Clerk of the District Court (apart from references to the reporter's transcripts of hearings and evidentiary proceedings) are designated as "R." References to the reporter's transcript of the hearing held on August 24, 1964, on the application for a preliminary injunction are designated as "H." References to the reporter's transcript of the evidence submitted at the hearing on the merits in January, 1965, are designated as "Tr."

[1] The first order was, in substance, under suspension until the April 28 order. See pp. 9-11, *infra;* Appendix B, pp. 21a-23a, *infra.* Thus there was no final order of the District Court until April 28, 1965.

The jurisdiction of the Supreme Court to review the orders by direct appeal is established by 28 U.S.C. §§ 1253 and 2101(b).

The following decisions sustain the jurisdiction of the Supreme Court to review the orders on direct appeal in this case: *Florida Lime & Avocado Growers, Inc.* v. *Jocobsen,* 362 U.S. 73 (1960); *Kesler* v. *Department of Pub. Safety,* 369 U.S. 153 (1962); *Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Davis* v. *Mann,* 377 U.S. 678 (1964); *Roman* v. *Sincock,* 377 U.S. 695 (1964); and *Lucas* v. *Colorado General Assembly,* 377 U.S. 713 (1964).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves Section 1 of Amendment XIV to the Constitution of the United States; Article III, Sections 1, 2, 3 and 4; Article XV, Sections 1, 2, 3 and 4; and Article XVI, Section 1 of the Constitution of the State of Hawaii; and Act 334, Session Laws of Hawaii 1949. The texts of the pertinent portions of the foregoing federal and Hawaii constitutional provisions and of Act 334 are set forth in Appendix D, pp. 39a-53a, *infra.*

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether it was error for the District Court to have affirmatively decreed that Article III of the Hawaii Constitution, which provides for the apportionment of the Hawaii Legislature—including the provisions for the apportionment of the Hawaii House of Representatives—was "constitutional and valid" except for the provisions fixing the number of senators per senatorial district?

2. Whether the apportionment of the Senate and of the House of Representatives of the Hawaii Legislature, considered as a whole, is inseverable, so that the invalidity of the apportionment of the Senate results in the overall invalidity of the apportionment of the Legislature?

3. Whether apportionment on the basis of "registered voters" is a valid basis for the apportionment of seats in the Hawaii Legislature?

4. Whether the Hawaii Legislature has the power to enact at least temporary legislation reapportioning the Legislature pending the adoption of an amendment to the Hawaii Constitution comporting with Federal constitutional requirements?

5. Whether the present apportionment scheme for the House of Representatives of the Hawaii Legislature results in invidious, and constitutionally impermissible, discrimination in favor of larger multimember districts and against single-member and smaller multimember districts?

6. Whether the Equal Protection Clause requires that both houses of the Hawaii Legislature consist of representatives from single-member districts, unless there are shown valid and compelling reasons to justify some multimember districts?

7. Whether the District Court abused its discretion in requiring that there be in effect in Hawaii a permanent reapportionment plan—as opposed to an interim plan—by the November 1966 general elections, and by requiring that the constitutional amendment necessary to bring about a permanent plan be proposed by a constitutional convention, rather than by the Legislature?

8. Whether the Equal Protection Clause requires that the apportionment of delegates to any constitutional convention called for the purpose of amending the Hawaii Constitution be substantially on a population basis?

9. Whether the District Court abused its discretion in fashioning relief, by the employment of excessive and drastic measures to compel reapportionment, in that it prohibited the Legislature from enacting legislation essential for the normal operation of state and municipal offices in Hawaii and essential for the continuation of programs for the health and welfare of the people of Hawaii, until such time as reapportionment legislation had been passed to the satisfaction of the District Court?[2]

STATEMENT OF THE CASE

Appellant is the Governor of the State of Hawaii and was an intervenor-plaintiff in the proceedings below. This proceeding was instituted in the United States District Court for the District of Hawaii on August 13, 1964. (R. 2-33)

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[2] This aspect of the appeal, relating to paragraph 4 of the first order (Appendix A, pp. 19a-20a, *infra*) and paragraph 2 of the second order (Appendix C, p. 37a, *infra*), was the subject of an Application for a Stay presented to Mr. Justice Douglas on May 13, 1965, and by him granted on May 21, 1965. Inasmuch as the Legislature, after the granting of the Stay, passed the necessary legislation at the Regular Session of the Third Legislature, this question is not of present importance and we will not develop it in this Jurisdictional Statement. However, against the possibility that the District Court's order may be read as prohibiting legislation at the future sessions of the Legislature, rather than simply at the Regular Session of the Third Legislature—to which it appears directed—we reserve the right to brief this question in our presentation of the case to the Court on the merits, should probable jurisdiction be noted.

On that day, certain residents, taxpayers and qualified voters of the City and County of Honolulu, State of Hawaii, on their behalf and on behalf of others similarly situated, filed a complaint against the Lieutenant Governor of the State of Hawaii in his capacity as the State officer responsible for supervising State elections. Plaintiffs alleged, and sought a declaration, that those sections of the State Constitution establishing and pertaining to the apportionment of the Senate and the House of Representatives of the Hawaii Legislature denied to plaintiffs due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

The complaint alleged that (a) the Senate was apportioned on the basis of geography and not of population, whereby senatorial districts containing 21 per cent of the population elect 79 per cent of the total number of senators; (b) the House of Representatives was apportioned on the basis of registered voters and not of population, with the result that plaintiffs' districts have fewer representatives than if apportionment had been based on population; (c) the apportionment plan covering both the Senate and the House of Representatives of the Hawaii State Legislature was an integrated apportionment scheme for overall legislative representation, and that portion of such plan covering the House of Representatives is not severable from that portion covering the Senate, and therefore the invalidity of the apportionment of the Senate invalidates that of the House of Representatives; and (d) the application of the apportionment provisions of the State Constitution resulted in a grossly unfair weighting of both houses of the Legislature in favor of the lesser populated areas of the State and in an unconstitutional apportionment of both houses.

Plaintiffs also prayed for a declaration that the Hawaii State Legislature has the power to provide for provisional apportionment by statute pending the adoption of an appropriate constitutional amendment, and that any apportionment law must provide for the apportionment of both houses on the basis of population. They prayed that defendant Lieutenant Governor be enjoined from performing any duties relating to or affecting the nomination and election of State legislators in the 1964 and 1966 elections unless and until such time as the Legislature had been reapportioned to the satisfaction of the district court. Together with the complaint, plaintiffs filed a motion for preliminary injunction to enjoin the defendant from performing his duties affecting the 1964 elections under existing provisions of the Hawaii Constitution.

Pursuant to 28 U.S.C. §§ 2281 and 2284, a district court of three judges was convened. On August 24, 1964, the appellant Governor and certain state senators and a representative were permitted to intervene as intervenors-plaintiffs and certain other State senators and representatives as intervenors-defendants. (R. 669)

The appellant Governor joined substantially in the allegations and prayer of the original plaintiffs. It was then, and continues to be, appellant's position that the existing apportionment of the Legislature of Hawaii, both as to the Senate and as to the House of Representatives, violates the Due Process and Equal Protection Clauses of the Constitution of the United States, in that the Legislature is not apportioned substantially on a population basis.

On August 26, 1964, the District Court orally denied the motion for preliminary injunction against conduct

of the 1964 elections under existing law. (R. 669) Thereafter briefs were filed and a hearing on the merits was held on January 11, 12, and 13, 1965.

The District Court's decision entered April 9, 1965, and dated February 17, 1965, held unconstitutional and invalid those provisions of Article III, Section 2 of the Hawaii Constitution fixing the number of senators per senatorial district. (Appendix A, p. 19a, *infra.*) However—without, of course, having before it any plan for the reapportionment of the Senate—the District Court also at this junction affirmatively held that the apportionment of the Hawaii Senate and that of the Hawaii House of Representatives were severable, and that the plaintiffs and appellant had failed to prove that the apportionment of the House caused any invidious discrimination in the weight of the plaintiffs' vote, or that the apportionment was the result of arbitrary or capricious action. Accordingly, the District Court then undertook to enter an order expressly declaring the remainder of the Article of the Hawaii Constitution dealing with the apportionment of the Legislature to be "constitutional and valid." (See Appendix A, p. 19a, *infra.*)

The District Court also held that "registered voters" was a permissible basis of apportionment. The court denied the power of the Legislature to enact provisional reapportionment legislation and held that "any change in the representation of senatorial districts must be by constitutional amendment" (Appendix A, p. 17a, *infra.*) Finally, the court denied "all other relief prayed for in the Complaint, Complaint in Intervention, and Cross-Complaint." As to remedial action, by paragraph 4 of its order, the court enjoined the parties from taking final action upon any legislation

(except such actions as were necessary to organize both houses at the regular session of 1965 and to appropriate funds for the session), until the Legislature had enacted legislation providing for amendment by a constitutional convention of the invalidated provisions of the Hawaii Constitution.[3] Jurisdiction was retained for all purposes, including that of judicially reapportioning the Senate in the event of failure of adoption of an appropriate amendment in time for the 1966 elections.

On March 9, 1965, on the motion of intervening defendant legislators, the court amended paragraph 4 of its order of February 17, 1965, to allow the Legislature to enact a provisional reapportionment plan and to propose a constitutional amendment by legislation instead of by constitutional convention. (See Appendix B, pp. 22a-23a, *infra.*) More specifically, under the amended order, the legislators were enjoined from taking final action on any legislation until the Legislature had (1) enacted a reapportionment and redistricting plan for the Senate on the basis of 1964 registered voters to be applicable to the 1966 elections, (2) adopted a proposed constitutional amendment embodying pertinent provisions of the provisional plan, to be presented to the electorate for ratification at the 1966 general election, and (3) provided for submission to the electorate at the 1966 general election the question: "Shall there be a convention to propose a revision of or amendments to the Constitution?" These measures were to be enacted by the Legislature on or before the twentieth calendar day following the date of the order, and submitted to the court for approval, and if they were not approved by the court, the original injunction was to be automatically reinstated.

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[3] See note 2, *supra.*

On March 18, 1965, the court was advised that a provisional plan, in substance approved by both houses, was then in conference committee and ready to be presented to the court whereby the Senate was to be reapportioned by dividing the State into the same existing six senatorial districts, changing only the number of senators allocated to each district, based upon the use of the method of equal proportions. By that plan, two senators were to be apportioned to the first senatorial district—East Hawaii; one to the second—West Hawaii; two to the third—Maui; nine to the fourth—Southern Oahu; ten to the fifth—the remainder of Oahu; and one to the sixth—Kauai. Briefs were filed by the parties on the question of the validity of the plan. (R. 458-532)

The court immediately informally advised the parties that such a grossly lopsided apportionment of senators, whereby forty per cent of the entire Senate would come from one senatorial district in Oahu and thirty-six per cent from another alongside, would not be acceptable. The plan was forthwith withdrawn from conference committee for reconsideration by the House of Representatives. Shortly thereafter, the District Court informally indicated by a memorandum from Judge Beeks to Judge Pence, concurred in by Judge Jertberg and released to the parties, that because Hawaii had a multimember district House, any other than single-member senatorial districting would have to be justified to the court. (Appendix E, pp. 54a-55a, *infra.*)

On April 14, 1965, the Legislature passed and intervening defendant legislators submitted to the court three bills pursuant to the court's order of March 9, 1965: (1) a statute providing for provisional reappor-

tionment of the Senate; (2) a proposed constitutional amendment embodying the same reapportionment; and (3) a statute calling for submission to the electorate of the question of whether a constitutional convention should be called. (R. 537-79)

On April 15, 16, and 17, 1965, testimony and arguments on the three Senate reapportionment bills were heard. On April 19, 1965, the court stayed its injunction against enactment of legislation, pending its ruling on the bills submitted. (R. 580-81)

On April 28, 1965, on the 58th day of the 60-day legislative session, the court issued its decision and order disapproving the provisional plan for the reapportionment of the Senate and reinstating its injunctive restraint against the legislators. (Appendix C, pp. 24a-38a, *infra.*)

On May 3, 1965, appellant Governor filed his notice of appeal to this Court. (R. 612-19) On May 7, 1965, certain intervenor-defendant senators and certain intervenor-defendant representatives filed notices of appeal to this Court. (R. 641-61)

On May 7, 1965, appellant Governor filed in the District Court a motion to suspend the injunction against the legislators and to stay the order of April 28, 1965, pending determination of his appeal to this Court. (R. 620-38) The District Court denied this motion on May 11, 1965. (R. 666-67) On May 13, 1965, appellant Governor applied to Mr. Justice Douglas for a stay of the injunction against legislation. By order dated May 21, 1965, Mr. Justice Douglas granted the stay.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The issues involved in this appeal are of vital concern, not only to the immediate parties to the case, but also to the people of the State of Hawaii, to those who will ultimately be charged with the duty of proposing amendments to the provisions of the Hawaii Constitution pertaining to the apportionment of the Hawaii State Legislature and, indeed, to all states confronted with similar problems under this Court's "reapportionment" decisions, *Baker* v. *Carr,* 369 U.S. 186 (1963), and *Reynolds* v. *Sims,* 377 U.S. 533 (1964), and its companion cases.

I. THE DISTRICT COURT ERRED IN AFFIRMATIVELY UPHOLDING THE CONSTITUTIONALITY OF THE PROVISIONS OF ARTICLE III OF THE HAWAII CONSTITUTION, APART FROM THE NUMBER OF SENATORS PER SENATORIAL DISTRICT. THE APPORTIONMENT OF THE HAWAII LEGISLATURE, CONSIDERED IN ITS ENTIRETY, FAILS TO MEET FEDERAL CONSTITUTIONAL REQUISITES

1. The District Court erred, initially, in failing to view the apportionment of the Hawaii State Legislature in its totality, in completely discounting the ample substantiation of interrelationship and nonseverability of the houses found in the *Proceedings of the Constitutional Convention of Hawaii,* and in holding that apportionment of both houses was severable and that therefore the patent invalidity of the Senate did not affect the validity of the apportionment of the House of Representatives.

The vice of the District Court's approach in practice is manifest. The District Court affirmatively undertook to declare that, except for the provisions fixing the number of senators per senatorial district,

the article of Hawaii's Constitution dealing with the apportionment of the State Legislature was "constitutional and valid."

But "it is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house." *Maryland Committee v. Tawes*, 377 U.S. 656, 673 (1964). Thus, until the court had before it a plan for the reapportionment of the Hawaii Senate, it was impossible and erroneous for it to undertake to make any such finding of the constitutionality of the apportionment of the House. The District Court—even aside from the points which we make below to the effect that in itself the House was improperly apportioned—was required to hold the apportionment of the Hawaii Legislature as a whole unconstitutional. —Such a holding would, as we develop below, permit the Legislature to adopt an interim reapportionment plan for both houses.

Furthermore, by affirmatively placing the sanction and stamp of constitutional validity upon every[4] pro-

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[4] Not only does the court's order, by affirmatively sanctioning as "constitutional and valid" the provisions of Article III apart from those "fixing the numbers of senators per senatorial district," amount to an express provision that the total number of senators is severable from the system of senatorial apportionment, but its opinion appears expressly to hold that the overall number of senators is a severable provision. (Appendix A, p. 5a, *infra*.)

But obviously the number of legislators in each house is closely related to and inseverable from the overall apportionment scheme. The number and size of districts, for example, affect the number of legislators, and are in turn affected by whatever might be deemed to be an optimum number of legislators. The close interrelationship is indicated in I *Proceedings of the Constitutional Convention of Hawaii*, Standing Committee Report No. 92 (Plaintiffs' Exhibit 11,

vision of the Article of Hawaii's Constitution dealing with the apportionment of the State Legislature other than the provisions fixing the number of senators per senatorial district, the District Court's order inevitably has the disasterous consequence of tending, as a practical matter, to withdraw every matter but the number of senators per senatorial district from reexamination by the Legislature and the people of the State.

We submit that such an order is as unwise as it is unjustifiable under this Court's decisions in *Tawes*[5] and in *Lucas* v. *Colorado General Assembly*, 377 U.S.

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pp. 1, 5, 8). When it invalidated the Senate apportionment provisions, the court should also have struck down, until an appropriate plan for the general reapportionment of the Legislature was submitted and effected, the allied provisions setting the number of senators.

This is not, of course, to argue that there is anything inherently wrong with having twenty-five Senators, as the District Court appears to have misinterpreted the argument of plaintiffs and appellant below (Appendix A, p. 5a n. 4, *infra*). It certainly might be that the Legislature could be properly apportioned with any reasonable number of senators. *Cf. Reynolds* v. *Sims, supra*, at 581 n. 63. The fundamental error of the court below lay in disregarding the inseverability of the apportionment of the two houses, and in affirmatively sanctioning any provision of the State Constitutional Article in question until the obvious malapportionment of the Legislature had been rectified. *Cf. ibid.*, at 581.

[5] The Court in *Tawes* found that the Maryland Senate was malapportioned. While the Court also found, contrary to the contention of the appellees, that the Maryland House of Delegates was not apportioned on a population basis, it is of significance that the Court also held that:

> "... Furthermore, whether or not the House is apportioned on a population basis, the scheme of legislative representation in Maryland cannot be sustained under the Equal Protection Clause of the Federal Constitution, because of the gross disparities from population-based representation in the apportionment of seats in the Maryland Senate." 377 U.S., at 673.

713, 734-35 (1964).[6] —In restructuring its legislature to meet the standards of the Federal Constitution, the State should not be foreclosed as a practical matter from making adjustments in such matters as the apportionment of the House of Representatives, the total number of senators, the relationship between Senate and House districts, and the like, as may be necessary to arrive at a fair and adequate reapportionment. The District Court's course of affirmatively sanctioning the remainder of Article III of the Hawaii Constitution tends, as a practical matter, to narrow the area in which any reapportionment plan will operate. Thus, we submit that the unwisdom[7] of the order of the court below,

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[6] In *Lucas*, where the lower court had assumed—and the parties had apparently agreed—that the apportionment of the Colorado House as set forth in a proposed apportionment plan [Amendment No. 7] was validly apportioned on the basis of population, the Court nonetheless struck down the entire plan.

[7] Indeed, the District Court's own order of April 28, 1965, itself indicates the first consequences of its failure to order an overall apportionment. There, in reviewing and then disapproving the Senate reapportionment plan passed by the Legislature the court gave as one of its principal reasons for disapproval, the failure of the plan to take into account the necessary inter-relationship of the two houses:

> "In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid, the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. Both houses of the legislature seemingly forgot that the schemes of districting *each* house, when conjoined, must offer compensating advantages to the voters—not only to those voters within each representative district, be it senate or house, but to all voters throughout the State." (Emphasis original.) Appendix C, p. 32a, *infra*.
>
> ". . . [B]ecause both houses failed to look at the political scene in its totality and instead viewed the reapportionment scheme of the senate as if it were something that could be

as well as its variance with this Court's holdings, makes the judgment below a proper subject for plenary consideration on this appeal.[8]

2. Moreover, any contention that the question of the apportionment of the two houses is severable is in fact rebutted by the proceedings of the Constitutional Convention of Hawaii, which affirmatively disclose that the framers conceived of representation in and apportionment of both the Senate and the House of Representatives as interrelated parts of an entire plan. As stated by Delegate Cable A. Wirtz, a member of the Constitutional Convention, in the course of the convention debates (Governor's Exhibit GO-2):

> "WIRTZ: The concensus [sic], as I gather, of this Convention and of the Legislative Committee is that we should have two bases of representation in a bicameral legislature, one of the houses to be on the basis of a population as indicated by means of registered votes; the other to be on the basis of a combination of geographical and political subdivisions, more or less patterned after our present existing Senate, keeping insofar as possible the

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fashioned without consideration of its tight juxtaposition to the house of representatives, each house of the legislature jointly and separately took such a myopic view of the political problem involved, that they failed to see and anticipate the overall result of arbitrarily joining their independently constructed senatorial plan with the existing representative scheme." Appendix C, p. 35a, *infra*.

[8] In Part II below, we argue that the District Court erred in sanctioning the "registered voters" basis of apportionment, and that with this error, even if it were a severable matter, the District Court's approval of the House apportionment must be reversed. In Part III below, we argue that the multimember districting of the House of Representatives should not have been affirmatively sanctioned, in particular.

> same ratio and proportion. Now the idea of having the two bases of reapportionment is to provide a truly bicameral legislature with balances and checks. The Senate is designed so that no county, no one county or no one senatorial district has control over that house; whereas, based upon population, obviously, in the House of Representatives the control will be at present in the County of Oahu." II *Proceedings of the Constitutional Convention of Hawaii* 760.

This interrelationship is also indicated in the report of the convention's Committee on Legislative Powers and Functions (Plaintiffs' Exhibit 11, p. 2):

> "... Your committee has agreed that the house of representatives must be apportioned on the basis of the number of registered voters among the several major island divisions (the present counties) but that the present ratio of representation among the four existing senatorial districts should be maintained in the senate." I *Proceedings of the Constitutional Convention of Hawaii* 249, Standing Committee Rep. No. 92.

Other statements in the *Proceedings* amply show that the apportionment of one house was an inducement and compensation for the apportionment in the other—a Senate based on geographical representation, giving a controlling majority to the counties of Hawaii, Maui, and Kauai and a House of Representatives based on registered voters, giving a controlling majority to the City and County of Honolulu.

Accordingly, as a matter of historic fact, as well as a matter of law taught by this Court's decisions, the apportionment of the Hawaii House is inseverable from the apportionment of the Hawaii Senate, and it was error for the District Court to have affirmatively upheld the apportionment of the House.

II. THE "REGISTERED VOTERS" BASIS SANCTIONED BY THE DISTRICT COURT IS NOT A CONSTITUTIONALLY PERMISSIBLE BASIS FOR REAPPORTIONMENT

We submit that the District Court's holding that the number of "registered voters" in the various districts was an acceptable basis for reapportionment was in error, and that this holding raises an important question which this Court should decide after further briefs and oral argument. This is because the use of the "registered voters" test tends to discriminate against persons in the lower economic levels, and, under the circumstances prevailing in Hawaii, introduces other inequities into legislative apportionment, to such an extent that the formula cannot be squared with the Equal Protection Clause.

This holding by the District Court should be corrected in the interest of obtaining a fair reapportionment of the Senate in the proceedings to that end which the District Court has ordered. Moreover, as the statistics at p. 23 n. 12, *infra,* demonstrate, the error of this holding by the District Court leads to the conclusion that even viewing the question of the apportionment of the House as a severable matter, there was error in the District Court's holding that the apportionment of the House was constitutional.

1. In *Reynolds* v. *Sims,* 377 U.S. 533 (1964), this Court stated:

> "Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. . . . The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races." *Id.,* at 567-68.
>
> "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the

> seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.*, at 568.

And in rejecting all apportionment schemes which submerged population as a controlling factor, the Court stated:

> "By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.*, at 577.[9]

Wesberry v. *Sanders*, 376 U.S. 1 (1964), clearly teaches that *people*, not only registered voters, are entitled to representation. There, the term "people" used in Article I, section 2, of the Federal Constitution ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .") was construed to mean the inhabitants of the States as indicated by census data. It said:

> "The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the

[9] Of the six reapportionment cases decided by this Court on June 15, 1964, only *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, involved the use of a plan based on a system of enumeration other than total population. There the Court stated that New York used the State's total population exclusive of aliens, as determined by the last Federal census, but did not comment upon the validity of that formula. It does not appear that the question was raised. In all of the other cases, Federal census data, containing the total population of the States concerned, were judicially used in determining whether or not malapportionment existed.

> number assigned to each State should be determined solely by the number of the State's inhabitants. The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people,' an idea endorsed by Mason as assuring that 'numbers of inhabitants' should always be the measure of representation in the House of Representatives. The Convention also overwhelmingly agreed to a resolution offered by Randolph to base future apportionment squarely on number. . . ." 376 U.S., at 13-14.

While congressional districting cases, such as *Wesberry,* may not be directly controlling in state apportionment cases, as stated by this Court in *Reynolds* v. *Sims, supra:*

> "Nevertheless, *Wesberry* clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." 377 U.S., at 560-61.

As stated further in *Reynolds* v. *Sims, supra:*

> "[T]he achieving of fair and effective representation for *all citizens* is concededly the basic aim of legislative apportionment . . . ." 377 U.S., at 565-66. (Emphasis supplied)

In *Davis* v. *Mann,* 377 U.S. 678 (1964), with respect to exclusion of military personnel from the apportionment base—an exclusion relied on by the Court below (Appendix A, pp. 9a-12a, *infra*)—this Court stated that:

> "Discrimination against a class of individuals, merely because of the nature of their employment,

without more being shown, is constitutionally impermissible." 377 U.S., at 691.[10]

2. The use of registered voters as a basis for Hawaii discriminates against those in the lower economic classes, and ignores, and accordingly discriminates against a substantial segment of the population who are not registered.

The proportion of registered persons in Hawaii—and very likely in other States—in the lower economic brackets is substantially less than those in the higher. According to Table 9 in plaintiffs' Exhibit No. 15, as of January, 1961, of persons with a family income of less than $4,000, only 43.8% of those eligible were registered, while of those in the $10,000 to $14,999 bracket, 72.4% were registered, and of those in the $15,000 or more bracket, 77.7% were registered. It is apparent therefrom that the use of registered voters unduly favors those on the higher economic levels and discriminates against those on the lower.[11] The right to

[10] The Court in the *Davis* case pointed out that Virginia's policy as evidenced by its election laws "favors and fosters voting by military and military-related personnel." *Id.*, at 691. See note 11, *infra.*

[11] Furthermore, the statement of the District Court in its February 17, 1965, decision that "87.1% of all of the possible *voting population* of the State" (emphasis original) were registered, is misleading. There the court stated that 231,914 persons could qualify as being eligible to register and that of this number 202,059 were registered. (Appendix A, p. 13a, *infra.*) No military personnel or their dependents were included among the 231,914 said to be eligible to register. In fact, as indicated in Table 7 of plaintiffs' Exhibit No. 14, footnote 1, in October, 1962, 11,400 military personnel and dependents met the qualifications for registration (that is, 20 years of age or more, with one year or more of residence in Hawaii and living off base). On the other hand, the 202,059 listed as registered voters included some military personnel and their dependents.

Table 7 of plaintiffs' Exhibit No. 14 shows that in 1964, 283,400 persons, exclusive of military personnel and dependents, were eligible to register. To this figure should be added 11,400 military personnel and dependents who met the age and residence require-

be fairly and effectively represented is a fundamental one and should not be made to depend upon an assiduousness in the pursuit of other rights, such as the right to vote.

Moreover, even a "civilian population" basis of apportionment, which was urged against the contention of appellant that total population should be the guide, produces inequities by excluding military personnel. Defendant's Exhibit A indicates that as of July, 1963, there were 23,900 households headed by a member of the armed forces on Oahu and of these military household heads 71.5 per cent, or 17,088, had been in Hawaii for more than one year. (Defendant's Exhibit A, p. 4) Their interests were not merely casual, as in the case of tourists and other transients. In 1960, all military personnel and their dependents in Hawaii were included among the "people" of Hawaii in determining the number of Representatives in Congress to which Hawaii was entitled. They should also be included in determining representation to the State legislature. *Davis* v. *Mann,* 377 U.S. 678, 691 (1964).

3. Finally, it cannot be said that in Hawaii the use of the "registered voters" test rather than a population test would be harmless error. The fact of the

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ments for registration. This 11,400 figure was as of October, 1962. (Table 7, n. 1, plaintiffs' Exhibit No. 14) Comparable 1964 data were not available. However, the military population in 1964 was larger than in 1962 (Table 4, plaintiffs' Exhibit No. 15) and so it appears that the 11,400 figure is conservative.

The addition of the 11,400 military personnel and dependents shows 294,800 to be the total possible voting population. Of these, 239,361, or 81%, were registered for the 1964 general elections. (Governor's Exhibit GO-4, last page) This still excludes from the apportionment base 55,439 eligible but unregistered persons or about one-fifth of the total eligible to register, not to mention 405,539 of the non-military population (total population less military and dependents, less registered voters). (Table 7, plaintiffs' Exhibit No. 14)

matter is that there is no consistent parallel in Hawaii between the ratio of registered voters and population. This may be seen from the excerpts from plaintiffs' Exhibit No. 1 which are set forth in the margin.[12]

For example, the number of registered voters in 1960 in the fourth and fifth senatorial districts was almost identical: 73,981 in the fourth, and 73,142 in the fifth senatorial district. However, the 1960 popu-

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Area and District	1960 Population*	1960 Reg. Voters**	Reapportionment by Method of Equal Proportions Based on: Pop. 1960	Reg. Voters 1960
State of Hawaii	632,772	202,059	76	76
THE SENATE				
First—Hawaii	44,297	19,266	1	2
Second—Hawaii	17,035	6,793	1	1
Third—Maui	42,855	17,539	2	2
Fourth—Oahu	182,307	73,981	7	9
Fifth—Oahu	318,102	73,142	13	9
Sixth—Kauai	28,176	11,338	1	2
THE HOUSE				
First—Hawaii	5,030	2,257	1	1
Second Hawaii	31,553	14,036	1	3
Third—Hawaii	7,714	2,973	1	1
Fourth—Hawaii	11,369	4,073	1	1
Fifth—Hawaii	5,666	2,720	1	1
Sixth—Maui	7,138	2,574	1	1
Seventh—Maui	35,717	14,965	3	3
Eighth—Oahu	68,281	18,369	6	5
Ninth—Oahu	42,816	7,410	3	2
Tenth—Oahu	95,118	17,003	8	4
Eleventh—Oahu	57,743	12,553	5	3
Twelfth—Oahu	25,552	10,000	2	3
Thirteenth—Oahu	28,592	7,807	2	2
Fourteenth—Oahu	42,476	16,056	3	4
Fifteenth—Oahu	60,125	25,869	5	6
Sixteenth—Oahu	42,750	16,176	3	4
Seventeenth—Oahu	36,956	15,880	3	4
Eighteenth—Kauai	28,176	11,338	2	3

Source: Department of Planning & Economic Development, State of Hawaii, July 28, 1964.

* Based on 1960 Federal Census.

** From Office of the Lieutenant Governor, State of Hawaii.

Instances when apportionment based on registered voters differs from that based on population are indicated by underscoring.

lation of the fourth senatorial district was 182,307; that of the fifth senatorial district was 318,102. Thus on the basis of registered voters, each district would be entitled to the same number of senators, nine, using the method of equal proportions. However, on the basis of population, the fifth senatorial district would be entitled to 13, and the fourth to seven senators.

Similar disproportion exists in the House districts—indicating that the District Court's holding that the House was constitutionally apportioned was in error, even if the apportionment of the House were a severable matter. In the House, on the basis of 1960 registered voters, the number represented by a legislator under existing apportionment ranges from a low of 2,257 registered voters in the first representative district to a high of 4,679 registered voters in the second representative district. On the basis of 1960 population, the range widens even more from a low of 5,030 persons in the first representative district to a high of 23,779 persons represented by a legislator in the tenth representative district, under existing House apportionment.

III. THE MULTIMEMBER DISTRICTING OF THE HOUSE OF REPRESENTATIVES IS ARBITRARY AND CAPRICIOUS AND DENIES EQUAL PROTECTION

Appellant further contends that the Hawaii House of Representatives is improperly apportioned because of its "multimember" system of districting. The District Court, in affirmatively sanctioning the apportionment of the House, held otherwise. We submit that this point clearly raises a question of a nature which this Court should resolve, and furnishes an